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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG822

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Biorka Island Dock Replacement Project

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed issuance of an Incidental Harassment Authorization; request for comments.

SUMMARY: NMFS has received a request from the Federal Aviation Administration (FAA) for an incidental harassment authorization (IHA) that would cover a subset of the take authorized in an IHA previously issued to FAA to incidentally take marine mammals, by Level A and Level B harassment, during construction activities associated with the Biorka dock replacement project in Symonds Bay, Alaska. The applicant was unable to complete the work before the expiration date of the 2018 IHA and NMFS is proposing to issue, an IHA authorizing incidental take for the remaining activities. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in *Request for Public Comments* at the end of this notice.

DATES: Comments and information must be received no later than [*insert date 30 days after date of publication in the **FEDERAL REGISTER***].

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Guan@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS FR notices of the 2018 proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

National Environmental Policy Act

To comply with the National Environmental Policy Act (NEPA) of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to environmental consequences on the human environment. This action is consistent with

categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review and a Categorical Exclusion memo was signed in October 2017.

History of Request

On March 31, 2017, NMFS received a request from the FAA for an IHA to take marine mammals incidental to pile driving and removal and down-the-hole (DTH) pile driving in association with the Biorka Island Dock Replacement Project (Project) in Symonds Bay, Alaska. NMFS published a notice of a proposed IHA and request for comments in the **Federal Register** on August 30, 2017 (82 FR 41229). We subsequently published the final notice of our issuance of the IHA on October 31, 2017 (82 FR 50397), making the IHA valid for May 1, 2018 through April 30, 2019. In-water work associated with the project was expected to be completed within the one-year timeframe of the IHA. The specified activities were expected to result in the take, in the form of Level A and Level B harassment, of five species of marine mammals including harbor seal (*Phoca vitulina*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), killer whale (*Orcinus orca*), and humpback whale (*Megaptera novaeangliae*).

On December 11, 2018, the contractor of FAA informed NMFS that part of the work on the project would be postponed due to severe weather conditions that created significant logistical challenges; that no work was able to be conducted during the winter season of 2018

and 2019, and that, therefore, not all of the in-water pile driving activities can be completed by the expiration of the 2018 IHA. FAA requested that a new IHA be issued that would be valid from May 1, 2019 through April 30, 2020. There is no modification from the initial project description provided in the FAA's IHA application, except that only a subset of the activities analyzed in the 2018 IHA remain to be completed.

Description of the Proposed Activity and Anticipated Impacts

The 2019 proposed IHA would cover a subset of the construction associated with the Biorka Island dock replacement project described in the initial **Federal Register** notice (82 FR 41229; August 30, 2017) for the proposed 2018 IHA. The 2017 IHA authorized Level A and B harassment of two species of marine mammals and Level B harassment of seven species of marine mammals (Table 1). FAA requests authorization to harass these same species. Accordingly, the take proposed for authorization here would apply to the same stocks, resulting from the same activities, and be in the form of Level A and Level B harassment. The number of proposed authorized takes is a subset of that authorized in the 2018 IHA, calculated using the same methods as the 2018 IHA, but considering the reduced subset of activities (described below).

Detailed Description of the Action

The majority of the planned construction project has been completed, and this proposed IHA would only cover potential marine mammal takes for the remainder of the pile driving activities. Specifically, these are:

- Two (2) 30-inch piles;
 - One has already been installed and just needs to be proofed with an impact hammer;
 - The other will be driven with an impact hammer;

- Four (4) 18-inch batter piles;
- Up to twelve (12) template H-piles (six per dolphin);
 - Includes installation and extraction
 - Use vibratory hammer.

NMFS refers the reader to the documents related to the previously issued 2018 IHA for more detailed description of the project activities. These previous documents include the **Federal Register** notice of the issuance of the 2018 IHA for FAA's Biorka Island dock replacement project (82 FR 50397; October 31, 2017), FAA's IHA application, the **Federal Register** notice of the proposed IHA (82 FR 41229; August 30, 2017) and all associated references and documents. A detailed description of the proposed vibratory and impact pile driving activities at the dock replacement project is found in these documents. The description remains accurate with the exception of the reduction noted above.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to the proposed 2019 IHA as well. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the 2018 IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the previous IHA, which remains applicable to the issuance of the proposed 2019 IHA. There is no new information on potential effects.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take is found in these previous documents. The methods of estimating take for the proposed 2019 IHA are identical to those used in the 2018 IHA. The source levels, and marine mammal density remain unchanged from the previously issued IHA, with the days of operation reduced to reflect the reduced number of piles remaining (21 days versus 70 days in the 2018 IHA). Regarding proposed authorized take, the stocks taken, types of take, and methods of taking remain unchanged from the previously issued IHA. Using the same methods and inputs described in the 2018 IHA, when the reduced amount of activity is considered, we anticipate and propose to authorize the take numbers indicated below in Table 1, as do the number of takes, which are indicated below.

Table 1. Estimated marine mammal takes in the 2019 IHA.

Species	Authorized Take	
	Level A	Level B
Harbor seal	5	100
Steller sea lion	3	100
Harbor porpoise	15	45
Killer whale	0	12
Humpback whale	1	100

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures proposed here are identical to those included in the **Federal Register** notice announcing the final 2018 IHA and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for inclusion in this IHA:

- Establishment of Shutdown Zone—For all pile driving activities, FAA will establish a shutdown zone. The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In this case, shutdown zones are intended to contain areas in which sound pressure levels (SPLs) equal or exceed acoustic injury criteria for some authorized species, based on NMFS’ acoustic technical guidance published in the **Federal Register** on August 4, 2016 (81 FR 51693).

- Establishment of Monitoring Zones—FAA must identify and establish Level A harassment zones. These zones are areas beyond the shutdown zones where animals may be exposed to sound levels that could result in permanent threshold shift (PTS). FAA will also identify and establish Level B harassment disturbance zones which are areas where SPLs equal or exceed 160 dB rms for impact driving and 120 dB rms during vibratory driving. Observation of monitoring zones enables observers to be aware of and communicate the presence of marine mammals in the project area and outside the shutdown zone and thus prepare for potential shutdowns of activity. NMFS has established monitoring protocols described in the **Federal Register** notice of the issuance (82 FR 50397; October 30, 2017) which are based on the distance and size of the monitoring and shutdown zones. These same protocols are contained in this proposed 2019 IHA.

- Temporal Restrictions—Work may only occur during daylight hours, when visual monitoring of marine mammals can be conducted.

- Soft Start—The use of a soft-start procedure is believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to implement soft start procedures. Soft Start is not required during vibratory pile driving and removal activities.

- Visual Marine Mammal Observation—Monitoring must be conducted by qualified marine mammal observers (MMOs), who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the 2018 IHA (82 FR 50397; October 30, 2017). In order to effectively monitor the pile driving monitoring zones, two MMOs must be positioned at the best practical vantage point(s). If waters exceed a sea-state which restricts the observers' ability to make observations within the shutdown zone

(e.g., excessive wind or fog), pile installation and removal will cease. Pile driving will not be initiated until the entire shutdown zone is visible. MMOs shall record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the 2018 IHA (82 FR 50379; October 30, 2017). At the conclusion of the in-water construction work, FAA will provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

Preliminary Determinations

FAA proposes to conduct a subset of activities identical to those covered in the previous 2018 IHA. FAA was not able to complete these activities within the effective dates of the 2018 IHA due to weather-related delays of the project. Potential impacts to marine mammals from these activities were previously analyzed for the issuance of the 2018 IHA, and there are no changes to these activities for this proposed IHA. Therefore, the potential effects from Level A and Level B harassment on the marine mammals previously analyzed remain applicable (though of a lower amount), as do NMFS prior determinations.

When issuing the 2018 IHA, NMFS found FAA's Biorka Island dock replacement project, in its entirety, would have a negligible impact to species or stocks' rates of recruitment and survival and the amount of taking would be small relative to the population size of such species or stock (less than 15 percent). The proposed IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA.

In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has preliminarily determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the proposed authorized takes will have a negligible impact on the affected marine mammal

species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) FAA's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species.

NMFS is authorizing take of two DPSs (*i.e.*, western DPS of Steller sea lions and Mexico DPS of humpback whales), which are listed under the ESA. The Permit and Conservation Division requested initiation of Section 7 consultation with the Alaska Region for the issuance of this IHA. The NMFS Alaska Regional Office Protected Resources Division issued a Biological Opinion in October, 2017 under section 7 of the ESA, on the issuance of an IHA to the FAA under section 101(a)(5)(D) of the MMPA by the NMFS Permits and Conservation Division. The Biological Opinion concluded that the proposed action is not likely to jeopardize the continued existence of western DPS Steller sea lions or Mexico DPS of humpback whales, and is not likely to destroy or adversely modify western DPS Steller sea lion critical habitat.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to FAA for conducting FFA's Biorka Island dock replacement project between May 1, 2019, and April 30, 2020, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

Request for Public Comments

We request comment on our analyses (included in both this document and the referenced documents supporting the 2018 IHA), the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed [action]. We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

On a case-by-case basis, NMFS may issue a second one-year IHA with with expedited notice and public comment when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements; and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized;

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the original findings remain valid.

Dated: March 4, 2019.

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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